IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:-

THE HONOURABLE THE CHIEF JUSTICE MR.H.L.DATTU
&
THE HONOURABLE MR. JUSTICE K.T.SANKARAN

TUESDAY, THE 31ST JULY 2007 / 9TH SRAVANA 1929

O.P.No.23191 of 1999(J)

PETITIONER:-

K.V.EBRAHIM, ARECANUT DEALER,
AYILAKKAD, MALAPPURAM.

BY ADV. SRI.M.PATHROSE MATHAI (SR)
SRI.JOHN RAMESH

RESPONDENTS:-
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1. ASSISTANT COMMISSIONER (ASSMT.)
SALES TAX OFFICE, SPECIAL CIRCLE,
MALAPPURAM.

2. DEPUTY COMMISSIONER, AGRICULTURAL
INCOMETAX AND SALES TAX, PALAKKAD.

3. COMMISSIONER OF COMMERCIAL TAXES,
THIRUVANANTHAPURAM.

BY SR. GOVERNMENT PLEADER MR.MOHAMMED RAFIQ

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 31/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

O.P.No.23191/1999-J

APPENDIX

PETITIONER'S EXHIBITS:-

EXT.P1 TRUE COPY OF THE PROCEEDINGS OF THE ASST. COMMR. (ASSMT.) DATED 11.7.94 FOR THE ASSESSMENT YEAR 1990-91.

EXT.P2 TRUE COPY OF THE PROCEEDINGS OF THE ASST.COMMR. (ASSMT.) DATED 11.7.94 FOR THE ASSESSMENT YEAR 1991-92.

EXT.P3 TRUE COPY OF THE PROCEEDINGS OF ASST. COMMISSIONER (ASSMT.) DATED 16.7.94.

EXT.P4 TRUE COPY OF THE ORDER OF THE DEPUTY COMMISSIONER (AIT & ST) PALAKKAD DATED 19.1.95 FOR ASSESSMENT YEAR 1990-91

EXT.P5 TRUE COPY OF THE ORDER OF THE DY. COMISSIONER (AIT & ST) PALAKKAD DATED 19.1.95 FOR THE ASSESSMENT YEAR 1991-92.

EXT.P6 TRUE COPY OF THE ORDER PASSED BY THE 3RD RESPONDENT DATED 6.4.99 FOR THE ASSMT. YEAR 1990-91

EXT.P7 TRUE COPY OF THE ORDER PASSED BY THE 3RD RESPONDENT DATED 6.4.99 FOR THE ASSESSMENT YEAR 1991-92.

/ TRUE COPY /

H.L.Dattu, C.J. & K.T.Sankaran, J.

O.P.No.23191 of 1999-J

Dated, this the 31st day of July, 2007

JUDGMENT

H.L.Dattu, C.J.

The assessee is a registered dealer on the files of the Assistant Commissioner (Assessment), Malappuram. He is carrying on the business of purchase and sale of arecanut. The petitioner has filed his returns for the assessment years 1990-91 and 1991-92 and had paid sales tax on the basis of the returns filed by him.

(2) The assessing authority has completed the assessments and also levied penal interest as per its orders dated 11.7.1994. Thereafter the mistake which crept in while computing the penal interest was rectified by the assessing authority as per its order dated 16.7.1994. Aggrieved by that portion of the order levying penal interest, the assessee has carried the matter by way of revision petition under Section 36 of the Act before the Deputy Commissioner of Commercial Taxes, Palakkad, who, by his order dated 19.1.1995, had confirmed the penal interest levied by the assessing authority.

(3) Aggrieved by the aforesaid orders, the petitioner was before the Commissioner of Commercial Taxes, Thiruvananthapuram. The second revisional authority by its order dated 6.4.1999 has confirmed the orders passed by the assessing authority as well as the first revisional authority relying upon the decision of this Court in the case of *Sales Tax Officer* v. *Maruthi Wire Industries Pvt. Ltd.* [1998 (2) KLT 248].

(4) Being aggrieved by the orders passed by the authorities under the Act in levying penal interest even before issuing the demand notice

for payment of the assessed tax, the assessee is before us in this Original Petition.

(5) At the time of hearing of the Original Petition, Sri.Pathros Mattai, learned Senior Counsel appearing for the petitioner would submit that the view expressed by this Court in the case of *Sales Tax Officer* v. *Maruthi Wire Industries Pvt. Ltd.* [1998 (2) KLT 248] is now reversed by the Supreme Court in the case of *Maruti Wire Industries (P) Ltd*. v. *Sales Tax Officer* [2001 (2) KLT 100 (SC)]. In the said decision, the Court has observed as under:

> "If the assessee fails to file a return, he exposes himself to penalty for such default; the Legislature could never have intended that the assessee should be liable, on pain of imposition of penalty, to deposit an amount which is yet to be ascertained through assessment. The provision by which the authority is empowered to levy and collect interest, even if construed as forming part of the machinery provisions is a substantive law, not adjectival law, and interest cannot be recovered by way of damages for wrongful detention of the amount. This Court further held that the "tax payable" or "tax due" is that amount which becomes due *ex hypothesis* on the turnover and taxable turnover shown in or based on the return or as to which an order of assessment has been made. The liability of the assessee appellant to pay sales tax could have arisen either on return of turnover being filed by way of self-assessment or else on an order of assessment being made. No doubt R.27(7A) of the Kerala General Sales Tax Rules, 1963 casts an obligation on assessees to file a return of total turnover and taxable turnover accompanied by proof of payment of the amount of tax due within 20 days of the previous quarter but such a return was not filed by the appellant. A failure to file return of taxable turnover may render the assessee liable for any other consequences or penal action as provided by law but cannot attract the liability for payment of penal interest under sub-s.(3) of S.23 of the Act. On the parity of reasoning that if a return of turnover would have been filed on the due date then the tax as per return would have become due and payable on that date".

(6) In view of the law declared by the apex Court, in our opinion, we cannot sustain the orders passed by the assessing authority as well as the first and second revisional authorities. Accordingly, the following:

Order

(i) The Original Petition is allowed.

(ii) The orders passed by the assessing authority dated 11.7.1994 and 16.7.1994, first revisional authority dated 19.1.1995 and the second revisional authority dated 6.4.1999 in so far as levying and demanding penal interest is set aside and in all other respects, the orders passed by the authorities under the Act are confirmed.

(iii) Consequently, C.M.P.No.38613 of 1999 is dismissed.

Ordered accordingly.

H.L.Dattu
Chief Justice

K.T.Sankaran
Judge

vku/-